

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 29, 2015 appellant, then a 58-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he broke his right foot on July 28, 2015 when he hit his foot on a railing while in the performance of duty. He underwent right open reduction and internal fixation of right fourth and fifth metatarsals on August 5, 2015. On August 19, 2015 OWCP accepted his claim for right foot fracture. Appellant returned to full duty on November 9, 2015.

On October 11, 2016 appellant filed a schedule award claim (Form CA-7). In a development letter dated October 14, 2016, OWCP noted that his traumatic injury claim was accepted for the conditions of fractures of the tarsal and metatarsal bones on the right. It requested a detailed narrative medical report addressing whether and when appellant had reached maximum medical improvement (MMI), the diagnosed conditions, a detailed description of any permanent impairment of the scheduled member, and a rating based on the A.M.A., *Guides*. OWCP afforded 30 days for a response. No response was received.

By decision dated November 16, 2016, OWCP denied appellant's claim for a schedule award as he had not submitted any medical evidence establishing permanent impairment to a scheduled member.

On December 4, 2017 appellant requested reconsideration of the November 16, 2016 decision. In support of his request for reconsideration, he provided a report dated June 30, 2017 from Dr. Martin Fritzhand, a Board-certified urologist. Dr. Fritzhand described appellant's history of injury on July 28, 2015 and the subsequent August 5, 2015 surgery for open reduction and internal fixation of the right fourth and fifth metatarsals. Appellant reported continued pain and discomfort with his right foot exacerbated with prolonged ambulation, standing, or weight-bearing. On physical examination Dr. Fritzhand found tenderness on palpation over the right fourth and fifth metatarsals and no movement of the right little toe. He reported that pinprick and light touch were diminished over the lateral aspect of the right foot. Dr. Fritzhand found that appellant had reached MMI "by August 2016." He applied the A.M.A., *Guides* and found that appellant had a class 1 impairment of the metatarsal with abnormal examination findings.<sup>2</sup> After evaluating the grade modifiers and applying the net adjustment formula, Dr. Fritzhand determined that appellant had one percent permanent impairment of his right lower extremity warranting a schedule award.

By decision dated March 1, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of OWCP's decision for which review is sought.<sup>3</sup> Timeliness is determined by the document receipt date (*i.e.*, the

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<sup>2</sup> A.M.A., *Guides* 504, Table 16-2.

<sup>3</sup> 20 C.F.R. § 10.607(a).

“received date” in OWCP’s integrated Federal Employees’ Compensation System (iFECS)).<sup>4</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>5</sup>

OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision.<sup>6</sup>

The Board has held, however, that a claimant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.<sup>7</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision because OWCP erroneously adjudicated appellant’s request for reconsideration under the clear evidence of error standard.

When appellant initially filed his claim for a schedule award he did not submit any medical evidence in support of a schedule award. In a letter dated December 4, 2017, he provided new evidence in the form of an impairment rating from his treating physician with regard to his schedule award claim. In his June 30, 2017 report, Dr. Fritzhand provided an impairment rating based on the sixth edition of the A.M.A., *Guides* and found that appellant had one percent impairment of his right lower extremity due to his accepted fracture of his right foot.

In its March 1, 2018 decision, OWCP denied appellant’s request for reconsideration, finding it was untimely filed and failed to demonstrate clear evidence of error. As previously noted, the Board has held that a claimant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.<sup>8</sup> The Board has explained that, if appellant has requested reconsideration, and has submitted new and relevant evidence with respect to a permanent impairment or an increased permanent impairment, then a claimant will be entitled to a merit decision on the issue.<sup>9</sup>

The Board thus finds that OWCP improperly denied appellant’s request for reconsideration under the clear evidence of error standard and failed to issue an appropriate decision regarding

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

<sup>5</sup> *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>6</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> *R.D.*, *supra* note 5; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; *See Linda T. Brown*, 51 ECAB 115 (1999).

appellant's claim for a schedule award.<sup>10</sup> On remand OWCP shall review and develop the medical evidence and issue a *de novo* decision regarding appellant's request for a schedule award.<sup>11</sup>

**CONCLUSION**

The Board finds the case not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 1, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 28, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> *D.S.*, *supra* note 9.

<sup>11</sup> *T.C.*, Docket No. 17-0800 (issued May 2, 2018).